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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,
v.
JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICI CURIAE* PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, INC., NATIONAL 4-H COUNCIL, NATIONAL EDUCATION ASSOCIATION, NATIONAL YOUTH ADVOCACY COALITION, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, NATIONAL ASSOCIATION FOR MULTICULTURAL EDUCATION, AND THE MATTHEW SHEPARD FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE*

Boy Scouts of America ("BSA") is one of the great organizations devoted to the growth and development of America's youth. For nearly a century, BSA has provided incalculable benefit to generations of boys, teaching millions how to put up tents and survive in the wilderness, and how to be productive citizens in our civil society. BSA has sought and forged a close relationship with government at all levels, from Congress to towns and schools across the country, and it holds a special place in the life of many communities. It is precisely because of this unique history as a broad-based, ubiquitous American institution that BSA's practice of discrimination against gay scouts and scoutmasters is particularly harmful to the youth BSA was formed to nurture. *Amici curiae* respectfully submit this brief (1) to underscore the important social values reflected in New Jersey's Law Against Discrimination ("LAD"), which forbids discrimination based on sexual orientation, and in the judicial application of that statute to BSA, and (2) to call to the Court's attention the massive body of evidence supporting the LAD and showing the devastating effect that anti-gay discrimination has on youths of Boy Scout age.

INTEREST OF *AMICI CURIAE*[1]

Parents, Families, and Friends of Lesbians and Gays, Inc. ("PFLAG") is a national, non-profit family organization with a grassroots network of over 77,000 member households and supporters, and 440 affiliates in the United States. Formed in 1981, PFLAG promotes the health and well-being of gay, lesbian, bisexual and transgendered persons, and their families and friends, through

[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

support, education, and advocacy to end discrimination. PFLAG acts to create a society that is healthy and respectful of human diversity, and to assist young people in achieving their full potential. For the last several years, one of PFLAG's top priorities has been its Safe Schools program, which works at the national, state, and local levels to end harassment and violence against gay adolescents.

National 4-H Council ("Council") is a not-for-profit organization that is the private partner of the public 4-H youth development program nationwide. In 1999, 4-H reached almost 6.5 million youth through over 93,000 clubs and other programs. Council fosters innovation and shared learning for the youth workers and young leaders of 4-H, and Council holds as a fundamental belief that discrimination in any form limits the realization of the potential of young people. Council participates in this case as a non-profit organization, not on behalf of the nationwide 4-H program.

The National Education Association ("NEA") is a nationwide employee organization with a current membership of more than 2.4 million teachers and other education employees, the vast majority of whom are employed by public school districts, colleges, and universities. NEA has long opposed and condemned discrimination on the basis of sexual orientation, especially by programs offered in, or sponsored by, public schoc. Because many public school districts sponsor or support Boy Scout troops, NEA's interest in opposing BSA's discriminatory practice is directly implicated in this case.

The National Youth Advocacy Coalition ("NYAC") and Gay, Lesbian, and Straight Education Network ("GLSEN") are national membership organizations working to end anti-gay bias against youth and to protect the physical and emotional well-being of young people. NYAC's 117 community-based member groups represent

33 states and the District of Columbia, and range from large national professional organizations to comprehensive service agencies to small support groups. GLSEN is the largest national organization whose sole mission is to end anti-gay bias in K-12 schools throughout the United States. Through its growing network of 85 chapters in 35 states, GLSEN strives to assure that each member of every school community is valued and respected, regardless of sexual orientation or gender identity. GLSEN has extensive experience with the effects of anti-gay bias in our nation's schools.

The National Association for Multicultural Education ("NAME") is the primary membership organization addressing issues of multicultural education throughout the United States. NAME was formed to bring people together from all levels of education, from organizations, businesses and communities, who are committed to achieving education that is multicultural and a society which is fair to all.

The Matthew Shepard Foundation was created in December 1998 by Dennis and Judy Shepard to honor the memory of their son. The goals of the Matthew Shepard Foundation include supporting diversity programs in education and helping youth organizations establish places where young people can feel safe and be themselves.

SUMMARY OF ARGUMENT

This is a case about exclusion of gay scouts and scoutmasters from BSA programs simply because they are gay, and about New Jersey's compelling state interest in ending the harm to gay youth caused by anti-gay discrimination by BSA and other quasi-public organizations in the State. The Supreme Court of New Jersey persuasively concluded, based on the facts in the record, that preventing BSA from excluding gay scouts and troop leaders from the organization would not infringe BSA mem-

bers' right to associate in pursuit of shared views. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1223 (N.J. 1999). Although the selection of an organization's members is a crucial part of an organization's identity, *see Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), there is no reason for this Court to disturb the New Jersey Supreme Court's careful factual findings.

New Jersey's interest in eradicating what its courts have called the "cancer of discrimination" based on sexual orientation is compelling and outweighs any burden the neutral, generally-applicable LAD might impose on BSA's First Amendment interests. Research from numerous fields of social science confirms New Jersey's legislative judgment that anti-gay discrimination exacts a terrible cost on youth—gay and straight alike. Gay youth are two to three times more likely to attempt suicide than their peers, and they account for approximately 30% of all adolescent suicides. Between one-third and one-half of gay students in a range of studies had experienced significant harassment, threats, or physical violence; the resulting alienation and fear contribute to alarming rates of depression, poor school performance, and truancy. Anti-gay discrimination by organizations like BSA grants to each rising generation of young people tacit permission to hate, sowing the seeds of violence researchers describe as "epidemic" in schools.

The damage caused by BSA's exclusion is particularly great, and New Jersey's interest in ending it correspondingly strong, because BSA has extensive connections with, and receives special benefits not generally available from, governments at all levels. BSA is not the "purely private" organization it portrays itself to be for purposes of this litigation. The factual record shows that: (1) BSA was chartered by Congress and receives supplies and assistance from the military and other federal agencies; (2) hundreds of scout troops in New Jersey and thousands

across the country are sponsored by public schools, police and fire departments, and other public entities; and (3) BSA has sought and gained privileged access to public schools across the country for instruction during the school day. These connections create the very real risk that the State will be viewed as sanctioning BSA's practice of excluding gay youth and leaders.

The New Jersey Supreme Court's decision is entirely consistent with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), which held that organizers of Boston's St. Patrick's Day parade could exclude a gay rights group that sought to march under its own banner. The Court specifically noted, however, that the organizers had *permitted* gays to march as part of other groups in the parade, and that the organizers would exclude *any* group (gay or straight) that expressed support for gays because such a message of tolerance was inconsistent with the organizers' views regardless of the identity of the speaker. Here, the reverse is true: BSA excludes gay scouts and scoutmasters based solely on their sexual orientation, not based on their advocacy of a message. Although BSA asserts that it wants to "avoid association with a message with which it does not agree," (Br. 19), BSA excludes only *gay* youth and adults—not the many straight participants and sponsoring organizations that publicly disagree with BSA's asserted "message" about the value of gay youth. *Amici* fully understand the importance of the freedoms of speech and association—and jealously guard those freedoms. But here the line between unprotected discrimination reflected in BSA's practice and a protected clash of viewpoints could not be more clear.

ARGUMENT

BSA and its *amici* completely fail to acknowledge the existence, much less the needs, of gay youth in Scout troops, and in the schools and communities by which

these troops are sponsored. BSA seeks to make this case exclusively about leadership, but its own practice of excluding gays makes no distinction between scouts and scoutmasters. The practice targets "known" as well as "avowed" gay members—even when they are simply kids seeking to abide by the Scout Oath and Law, and struggling to get the support and training that BSA has to offer. But New Jersey has not forgotten these gay youth. Its anti-discrimination policy recognizes, as this Court has, that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

In *Roberts* the Court set out the test for determining when a State may act to prevent discrimination in an organization's membership: infringements on expressive association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623; *accord Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987). New Jersey's state interest in preventing discrimination against gay youths outweighs any burden the statute imposes on BSA's rights of expressive association.[2]

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[2] The Supreme Court of New Jersey properly rejected BSA's intimate association claim. Under this Court's clear precedents, the organization's unselective, open admissions policy and practice of including non-members in scouting activities mean that BSA is not "the kind of intimate or private relation that warrants constitutional protection." *Rotary Club*, 481 U.S. at 546. Because the state court's thorough analysis, *see Dale*, 734 A.2d at 1219-22, accords fully with this Court's precedents, we do not address the intimate association claim in this brief.

I. NEW JERSEY'S COMPELLING INTEREST IN ERADICATING THE "CANCER OF DISCRIMINATION" IS SUPPORTED BY EXTENSIVE SOCIAL SCIENCE RESEARCH ESTABLISHING THE HARM TO YOUTH CAUSED BY ANTI-GAY DISCRIMINATION.

The purpose of the LAD is simple, and clear: "[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination'" in all its forms. *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793, 799 (N.J. 1969)). In 1991, the New Jersey Legislature amended the LAD to prohibit "sexual orientation" discrimination, recognizing that anti-gay discrimination is harmful and in fundamental conflict with New Jersey's public policy—and that the State has a compelling interest in ending it. The legislative judgment, reached by many other states and localities across the country, is confirmed by social science research on the harms of anti-gay discrimination to society as a whole, and particularly to individual gay and straight adolescents.

A. Anti-Gay Discrimination Leads to Suicide and Other Self-Destructive Behavior Among Gay Youth, Promotes Violence, and Harms Society as a Whole.

The national face of anti-gay violence belongs to 21-year-old college student Matthew Shepard, who was beaten in October 1998 by two men (one of whom was an Eagle Scout), then lashed to a fence near Laramie, Wyoming, and left to die, all because his attackers believed him to be gay. *See* Tom Kenworthy, *Neighbors Trace Two Men's Journey to a Wyoming Jail*, Wash. Post, Oct. 22, 1998, at A2. Unfortunately, the effects of discrimination on gay youth extend far beyond that one tragic case. Health care professionals, educators, and social workers have found that discrimination contributes to the alienation and fear many gay adolescents feel, putting them at high risk for substance abuse, homeless-

ness, depression and suicide, with resulting devastation to their families and friends. It also feeds the cycle of violence that caused Matthew Shepard's gruesome death and assaults on countless others.

The practice of excluding gays from an organization as well-known, widespread, and otherwise inclusive as BSA contributes to the "cancer of discrimination." When young Scouts—whether in a public school troop, the local fire department troop, or any other—see their leaders and peers banned from scouting based on sexual orientation, the message is clear: They should tolerate people of all races, whether African-Americans or Asians; of all religions, whether Methodists or Buddhists; of all talents, whether music or athletics; of all personalities, whether bookish or brash; and of all shapes and sizes—in short, they are taught *everyone* is worthy of acceptance, friendship, and training in the Boy Scout program to become valued members of the community, everyone *except* gays. This act of disapproval lands a devastating blow to the self-esteem of the excluded gay youth, and confers a license to hate on the Scouts that remain. The consequences of both are severe.

1. *The Pattern.*

For a striking example of the pattern of harassment that too many gay youth face on a regular basis, the Court need look no further than the Seventh Circuit's opinion in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), upholding the right of a gay student to pursue a Section 1983 claim against school officials for failure to afford him equal protection of the laws. Beginning around age 13, and continuing for years, Jamie Nabozny was subjected to various forms of verbal and physical abuse on buses going to and from school, on playgrounds, in hallways, and even in classrooms. *Id.* at 451-52. On one occasion, Nabozny was pushed to the floor in a science classroom and subjected to a mock rape; his attackers

claimed that he should enjoy it. *Id.* at 451. Later Nabozny was savagely beaten by a group of eight boys outside the school library while other students looked on laughing; he collapsed from internal bleeding as a result of the beatings. *Id.* at 452. Nabozny missed weeks of school and attempted suicide twice because of the harassment. *Id.* at 451-52. School officials refused to take adequate steps to stop the harassment and violence, despite repeated pleas for help by Nabozny. Instead, the school principal "said that 'boys will be boys' and that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students." *Id.* at 451. What happened to Jamie Nabozny was not an isolated incident, nor was it much different from the harassment that happens every year across the country.

The Safe Schools Coalition of Washington State, a public-private partnership of seventy-four state agencies and private organizations (including PFLAG's Seattle chapter, GLSEN's Washington state chapter, and the Washington Education Association) recently conducted one of the most extensive surveys of harassment and violence directed at gay youth. Over a five-year period, the project collected 111 narratives detailing years of harassment and threats, and many incidents of physical violence. Safe Schools Coalition of Washington State, *They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools* 1 (1999). One seventh grader was left with a broken arm and sprained ankle, among other injuries, after a game of "smear the queer." *Id.* at 34. A ninth grader reported that he was repeatedly beaten by classmates emboldened after a gym teacher asked, "What's the matter, don't you like girls?" Eventually, one day after school, he was attacked by two students who stripped him, raped him, and urinated on him. *Id.* at 44. Many students reported that the harassment and violence made them feel unsafe at school, feel more isolated and lonely, avoid parts of the school building, and have a harder time

paying attention in class. Twelve of the gay adolescents changed schools to try to escape the abuse, ten respondents dropped out of school, ten attempted suicide, and two succeeded in killing themselves. *Id.* at 2.

2. *The Statistics.*

The Court need not rely on compelling narratives to understand the scope of the problem. The numbers reported by a wide range of researchers paint a bleak picture of the harassment and violence gay adolescents face, and the consequences that too often result.

Harassment and Violence. Numerous researchers have concluded that "lesbian and gay youths experience a hostile climate of harassment and violence that enforces their invisibility in schools," and that "[b]oth adults and students in schools engage in harassment of lesbian and gay students." Joyce Hunter & Robert Schaecher, *Gay and Lesbian Adolescents, in* Encyclopedia of Social Work 1055, 1058 (19th ed. 1995). According to one survey of the literature, "[b]etween 33% and 49% of those [gay students] responding to community surveys report being victimized in school." Anthony R. D'Augelli, *Lesbian, Gay and Bisexual Development During Adolescence and Young Adulthood, in* Textbook of Homosexuality and Mental Health 267, 276 (Robert P. Cabaj & Terry S. Stein eds., 1996) (citing K. T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, 5 J. Interpersonal Violence 274 (1990)).[3] Indeed, leading researchers have called violence and harassment against

[3] *See also* Massachusetts Dep't of Education, *Massachusetts Youth Risk Behavior Survey* § 5 & Figure 5G (1997) (28.1% of gay high school students surveyed had been threatened or injured with a weapon at school, compared to 6.6% of their peers); Abby Abinati, *Legal Challenges Facing Lesbian and Gay Youth, in* Helping Gay and Lesbian Youth 149, 156 (Teresa DeCrecenzo ed., 1994); Neil W. Pilkington & Anthony R. D'Augelli, *Victimization of Lesbian, Gay, and Bisexual Youth in Community Settings*, 23 Am. J. Community Psychol. 34 (1995).

gay students "endemic" at the high school and junior high school levels. Emery Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 29 (1987).

Suicide. Gay youth attempt suicide at a truly alarming —and disproportionately high—rate. And too often they succeed. According to studies by the federal government, gay youth are several times more likely to attempt suicide than other young people, and as many as 3000 gay youth take their lives each year. *Colin v. Orange Unified Sch. Dist.*, —— F. Supp. 2d ——, 2000 WL 19467, at *16 (C.D. Cal. Feb. 4, 2000) (citing federal study finding gay youth six times more likely to attempt suicide); Paul Gibson, *Gay Male and Lesbian Youth Suicide, in* Report of the Secretary's Task Force on Youth Suicide 3-110, 3-115 (U.S. Dep't of Health & Human Services Pub. No. (ADM) 89-1623) (1989) (finding two to three times more likely).[4] Recent data show that gay youth account for approximately 30% of all completed adolescent suicides. Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 Pediatrics 895 (1998).

Other Harms. Gay youth also engage in self-destructive behavior short of suicide at disproportionately high rates. Because of the harassment they face, gay students are far more likely than their peers to skip classes and drop out

[4] *See also* Gary Remafedi et al., *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 Am. J. of Public Health 57 (1998); Mass. Dep't of Education at § 8 (study of 3,982 Massachusetts high school students found that 37% of gay students had attempted suicide, compared to 8% of their peers); Michael Radkowsky & Lawrence J. Siegal, *The Gay Adolescent: Stressors, Adaptations, and Psychosocial Interventions*, 17 Clinical Psychol. Rev. 191, 206-07 (1997); American Academy of Pediatrics, *Homosexuality and Adolescence*, 92 Pediatrics 631-34 (1993); Gibson at 3-111; Hunter & Schaecher, *Gay and Lesbian Adolescents* at 1060.

of school, *see* Mass. Dep't of Education at § 5; Radkowsky & Siegal at 200; to abuse alcohol and drugs, *see* Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1059; and to run away from home, Caitlin Ryan & Donna Futterman, *Lesbian & Gay Youth: Care and Counseling* 25 (1998); Radkowsky & Siegal at 200.[5] The consequences of such self-destructive behavior are often severe: "Rejected by family and friends, with no place to go, many of these 'throwaway' youths end up on the streets, putting them at high risk for prostitution and drug abuse." Hunter & Schaecher, *Stresses*, at 186.

3. *The Causes.*

What accounts for these astonishing statistics? Educators, health care professionals, and social workers who work with young people have spent considerable time and effort studying the problem. They overwhelmingly identify the root cause as the profound lack of emotional and social support that results from anti-gay isolation and ostracism. Discrimination against gays by leading organizations in the community such as BSA is directly and indirectly responsible for creating a climate of harassment and violence.

Gay Youth. Researchers have identified a basic internal conflict confronting gay youth: "For the adolescent, an identity crisis occurs that can be understood as the conflict produced by the juxtaposition of the negative ideas about homosexuality learned throughout childhood with the new awareness of homosexual attractions and identity that is developing." Anderson at 15. *See also* Ilan H. Meyer,

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[5] *See also* Dennis A. Anderson, *Lesbian and Gay Adolescents: Social and Development Considerations*, High Sch. J. 13, 18 (1993) ("Low self-esteem, academic inhibition, truancy, substance abuse, social withdrawal, [and] depressed mood . . . are not unusual."); Joyce Hunter & Robert Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 Social Work in Educ. 180, 184 (1987).

Minority Stress and Mental Health in Gay Men, 36 J. Health & Social Behavior 38, 40 (1995); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & Sexuality 133, 145 (1991); Hetrick & Martin at 26-27; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057. To this internal conflict gay youth must add exclusion from peer groups and community institutions like BSA. When a gay scout (or prospective scout) sees his peers thrown out of the troop in a practice enforced by a teacher or community leader—or sees a respected former Eagle Scout excluded as unfit to be a leader—the resulting stigma corrodes the self-worth and self-esteem of the gay youth. As this Court recognized in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) discrimination reaching children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *See also Heckler v. Mathews*, 465 U.S. 728, 739-40 & n.7 (1984) (citing cases). Gay adolescents "soon learn that knowledge of their sexual orientation may have a negative effect on their treatment in all sectors of society, including the family, school, job opportunities, and so forth." Hetrick & Martin at 29. *See also* American Academy of Pediatrics et al., *Just the Facts About Sexual Orientation & Youth*, at 3 (1999).

In addition to reinforcing broader social stigma, exclusion from organizations like BSA deprives gay youth of the chance to make connections with their peers (and vice-versa). In one extensive study of the difficulties faced by gay adolescents, "[t]he most frequent presenting problem was isolation [and] . . . the socially isolated young person reported having no one to talk to, feeling alone within every social situation, including the family, peers, school, and church or synagogue." Hetrick & Martin at 31. Rejection by social institutions as broad-based and respected in the community as BSA compounds this iso-

lation. Meyer at 41; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057.

The literature reveals a strong correlation between experiences by gay youth of stigma, prejudice and violence and various forms of emotional distress, such as depression and threats of suicide. According to the American Academy of Pediatrics Committee on Adolescence, "[t]he psychosocial problems of gay and lesbian adolescents are primarily the result of societal stigma, hostility, hatred, and isolation." *Homosexuality and Adolescence*, 92 Pediatrics 631-34 (1993).[6] The ostracism of gay adolescents produces many signs of clinical depression—pervasive loss of pleasure, change of appetite, sleep disturbance, slowing of thought, lowered self-esteem with increased self-criticism, and feelings of guilt and failure. A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. Homosexuality 163, 172 (1988); Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men*, 5 J. Interpersonal Violence 366, 370-71 (1990); Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057.

Families and Friends. Anti-gay discrimination also harms the families and friends of gay youth. They suffer from seeing their children, siblings, or friends being attacked, committing suicide or other self-destructive behaviors, struggling with depression, and so on. *See* Garnets at 374 (Family and friends "also must deal with the victimization experience . . . . [T]hey must deal with the survivor's immediate reactions (including her or his displaced feelings of displaced anger). They must make sense of the event for themselves and deal with their own self-blame."); *PFLAG Policy Statement: Legalized Discrimination*

[6] *See also* Meyer at 51-52; Ryan & Futterman at 4-5; Radkowsky & Siegal at 200; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1060; Gibson at 3-110; Martin & Hetrick at 172.

(adopted Sept. 7, 1992) <www.pflag.org/press/policy/discrim.html> ("Loving family relationships are threatened when some members are stigmatized and labeled 'abnormal' and 'perverse.' "); *see* Dennis A. Anderson, *Family and Peer Relations of Gay Adolescents, in* 14 Adolescent Psychiatry: Developmental and Clinical Studies 162, 165 (S. Feinstein ed. 1987).

Straight Youth. Anti-gay discrimination also has serious harmful effects on straight youth. Such discrimination "hurts [youth] who are not gay or lesbian because they are taught to hate and discriminate." Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1059. Exclusion of gays from community organizations like BSA conveys what the historian C. Vann Woodward called "permissions to hate." *The Strange Career of Jim Crow* 81 (2d ed. 1966). The connection between discrimination and violence occurs at many levels, and frequently starts with a tolerance of discrimination by the government and by important societal institutions, such as BSA, that set community standards. Herek, *Myths About Sexual Orientation*, at 171. With the tolerance of anti-gay discrimination, "school environments become the breeding ground for bigotry." Abinati at 156. When anti-gay remarks and more serious forms of harassment and discrimination go unchecked other students are more likely to join in. Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1058. Indeed, "[w]hen adults tolerate abusive language, the next step is often physical violence." Hunter & Schaecher at 1057. Marginalization and exclusion "simultaneously makes lesbians and gay men inivsible and legitimizes hostility, discrimination, and even violence against them." Garnets at 369.

In fact, this case itself has demonstrated the wafer-thin distance that separates anti-gay violence from discrimination like BSA's exclusion of gay scouts and scout-

masters. The day after the New Jersey Supreme Court's decision last August, a scoutmaster at a camp in Rhode Island tore a picture of James Dale (the Respondent here) from a newspaper article about the decision and used it for target practice. Larry Hatfield, *Scout Leader Fired for Gay Gun Target*, S.F. Examiner, Aug. 13, 1999, at A1. The scoutmaster soon left the camp, *id.*, but not before vividly illustrating what New Jersey's Legislature was trying to avoid when it amended the LAD to prohibit anti-gay discrimination.

B. The Social Science Evidence Supports New Jersey's Determination That a Ban on Anti-Gay Discrimination Serves a Compelling State Interest.

This Court has frequently turned to social science evidence when weighing a State's asserted interest in a constitutional analysis. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 855 (1990); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (citing "the judgment found in the relevant literature"); *Brown*, 347 U.S. at 494 & n.11 (reliance on "modern authority"). As the preceding section demonstrates, discrimination on the basis of sexual orientation is as invidious in its own way, particularly when directed at young people, as discrimination on the basis of race which this Court repeatedly has condemned. Under *Roberts*, States have the constitutional leeway to address this problem if they choose, so long as they do not target expression.

New Jersey is unmistakably of the opinion that the eradication of sexual orientation discrimination is a state interest of the highest order because it has consequences for the immediate victims and society as a whole.[7] With-

[7] In addition, the LAD was enacted to promote New Jersey's interest in the general welfare of its population, as well as the physical and emotional well-being of individuals. N.J. Stat. Ann. § 10:5-3. States have a "compelling interest in the maintenance of domestic peace" and "'in protecting the health and well-being of [their] citizens.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 742 (1983) (citation omitted). This interest is especially strong where the health and welfare of children and teenagers are at stake. *See, e.g., Craig*, 497 U.S. at 855 (state has a "traditional and transcendent interest in protecting the welfare of children") (internal quotation marks and citation omitted); *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) ("The City's interest in protecting the safety and welfare of its minors is also a compelling interest."). That interest includes not only the physical health and safety but also the "psychological well-being" of minors. *Osborne*, 495 U.S. at 109.

out targeting expression, New Jersey has determined that "'affectional or sexual orientation [is] a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State.'" *Dale*, 734 A.2d at 1227-28 (quoting N.J. Stat. Ann. § 10:5-3).[8] In passing the LAD, a law of general applicability, the Legislature also expressed its intent to protect and ensure "the economic prosperity and general welfare of the inhabitants of the State," and determined that "because of discrimination, people suffer personal hardships . . . [including] physical and emotional stress; and in some cases severe emotional trauma, illness, . . . career, educational, family and social disruption; and adjustment problems . . . ." N.J. Stat. Ann. § 10:5-3. As one court recognized in addressing a similar law: "The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all."

[8] This public policy is also reflected in prohibitions against discrimination on the basis of sexual orientation by state agencies, *see* New Jersey Executive Order No. 39 (Aug. 16, 1991), and by state courts, *see* New Jersey Code of Judicial Conduct Canon 3A(4) (1993).

Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 37 (D.C. App. 1987).

New Jersey joins a growing list of states and cities extending protections against discrimination based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), Justice Kennedy's opinion for the Court described the "emerging tradition of statutory protection" by States and municipalities against sexual orientation discrimination and found "nothing special" in those protections. "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631. *See also Roberts*, 468 U.S. at 624 (noting that many States have "progressively broadened the scope of [their] public accommodations law in the years since [they were] first enacted, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden") (citation omitted); *Gay Rights Coalition*, 536 A.2d at 33.[9]

This Court has repeatedly recognized States' compelling interest in eradicating discrimination, and has held that "[a] state enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts*, 468 U.S. at 625

[9] As of October 1999, nine states (including New Jersey) and the District of Columbia, along with 92 cities and counties in 24 States, included sexual orientation in their laws prohibiting discrimination in public accommodations. In addition, many states, cities, and counties barred discrimination in public employment, private employment, and/or education. For comprehensive listings of these statutes and ordinances, see Lambda Legal Defense and Education Fund, *Summary of States, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation*, <http://www. lambdalegal.org/cgi-bin/pages/documents/record?record=217>; Policy Institute of the National Gay and Lesbian Task Force, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* 4, 83 (2000).

(citation omitted); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982); *PruneYard Shopping Ctr v. Robins*, 447 U.S. 74, 81-88 (1980).[10]

It is not the case that only a "national" policy against discrimination based on sexual orientation can constitute a compelling *state* governmental interest. In *Roberts*, the Court noted that the state law against sex discrimination was more extensive than its federal counterpart, but nevertheless concluded that it was supported by "compelling state interests of the highest order" that outweighed any burden on the First Amendment rights of the organizations. 468 U.S. at 424-26. *See also Gay Rights' Coalition*, 536 A.2d at 38 n.25 (rejecting "national policy" requirement). The New Jersey legislature's reasoned judgment that discrimination based on sexual orientation threatens not only the welfare of individual New Jersey inhabitants but also the state's own institutions and foundation was the state's determination to make, based on its attention to local concerns.

II. NEW JERSEY'S INTEREST IS PARTICULARLY STRONG IN THIS CASE BECAUSE OF THE SIGNIFICANT SPECIAL BENEFITS BSA RECEIVES FROM GOVERNMENT.

Although the New Jersey Supreme Court conclusively determined that BSA is a "place of public accommodation" under the LAD, *Dale*, 734 A.2d at 1218, BSA now complains (Br. 37), that it is inappropriate to apply a state

[10] *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (noting that city's asserted purpose was "to ensure the basic human rights of members of groups that have historically been subjected to discrimination" and concluding that "[w]e do not doubt that these interests are compelling"); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Alfred L. Snapp & Son*, 458 U.S. at 609 ("This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.").

public accommodation law to an organization like BSA because BSA is "neither public nor quasi-commercial." Despite BSA's suggestion, the record (and common experience in cities and towns across the country) unequivocally demonstrates that BSA is not a purely private organization. It is widely seen as a unique American institution, thanks to its close and special connections to government at all levels. When a group so tightly identified in the community with public authorities discriminates, it exacerbates the harm to youth described in the social science literature. It is, therefore, particularly appropriate for New Jersey to subject BSA to its command forbidding anti-gay discrimination, in order to avoid any actual or perceived government endorsement of BSA's exclusion of gay scouts and scoutmasters. And applying the LAD to an organization like BSA that has unique and special connections to government would not trigger the parade of horribles that BSA and its *amici* fear.

A. BSA Receives Special Benefits from Government.

The Supreme Court of New Jersey carefully detailed the record evidence that BSA "maintains close relationships with federal and state governmental bodies." *Dale*, 734 A.2d at 1211. In fact, the BSA's contacts with government entities are unique and pervasive.

To begin, "[i]t is clear that Boy Scouts benefits from a close relationship with the federal government." *Dale*, 734 A.2d at 1212. BSA was chartered by Congress in 1916 under Title 36 of the United States Code, "Patriotic and National Observances, Ceremonies, and Organizations," to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues . . . ." 36 U.S.C. § 30902. BSA is required to make a yearly report to Congress of its "proceedings." It also receives significant equipment, supplies

and services from the federal government. The Department of Defense and other agencies are authorized to lend BSA cots and blankets, flags, and other equipment, and to furnish services and medical supplies without reimbursement. 10 U.S.C. § 2544. Scout troops use facilities on military installations for shows, meetings, and training activities, and BSA itself brags that "military personnel serve Scouting in many capacities." *Dale*, 734 A.2d at 1212.

BSA also has significant entanglements with state and local governments, which "have contributed to Boy Scouts' success." *Dale*, 734 A.2d at 1212. "A large percentage of scouting units nationally, as well as in New Jersey, are chartered by public schools and affiliated organizations." *Id.* at 1212-13. In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units and constitute about one-fifth of the chartering organizations in the State. *Id.* at 1201. Moreover, BSA makes extensive use of public school facilities for recruiting purposes: "Boy Scouts currently recruits many of its members through its presence in and use of school facilities," and "public schools and community colleges often host scouting meetings, activities, and recruiting events such as 'School Nights,'" at which an open scout meeting is held at a school to encourage students to join. *Id.* at 1212-13. Increasingly, public schools allow scout troops to use their facilities during the school day on conditions not generally available. Indeed, "[a]ccording to Boy Scouts, '[m]ore and more of our schools are becoming available for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas.'" *Id.* at 1213. In addition, "BSA's 'learning for life' program has been installed in many public school classrooms throughout the country," *Dale v. Boy Scouts of America*, 706 A.2d 270, 282 (N.J.

App. Div. 1998), reaching close to 700,000 students nationwide in 1992, *Dale*, 734 A.2d at 1213.

BSA's connections with state and local government in New Jersey and elsewhere extend beyond the schools. Other agencies are important supporters of Scouting:

> Local governmental agencies, such as fire departments and law enforcement agencies, serve Boy Scouts by sponsoring scouting units. Nationally, over 50,000 youth members belong to units sponsored by fire departments, whereas in New Jersey alone over 130 units are sponsored by fire departments and over 100 units are sponsored by law enforcement agencies.

Dale, 734 A.2d at 1212. New Jersey has also authorized its fish and wildlife agency to "stock with fish any body of water in this state that is under the control of and for the use of the . . . Boy Scouts," N.J. Stat. Ann. § 23:2-3, and has exempted BSA from motor vehicle registration fees, N.J. Stat. Ann. § 39:3-17.

B. BSA's Connection with Government Gives New Jersey a Strong Regulatory Interest in Applying Its Anti-Discrimination Mandate.

BSA's entanglement with public institutions, especially schools, is significant in at least two respects. First, given the epidemic of harassment and violence gay adolescents suffer, BSA's special connection to the State makes the harm from its anti-gay practices all the greater. When BSA is active in a school, its anti-gay practices confer permission to hate and contribute to the transformations of schools from safe zones into battle zones for gay youth. It is likely that adolescents—gay and straight alike—view BSA's exclusion of gay scouts and scoutmasters as sanctioned by the State and community. This powerful message of stigmatization exacerbates the harms educators and social scientists have identified. Emery Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 28 (1987). As this Court has recognized in other contexts, governments can cause significant injury by appearing to endorse the discrimination of an individual or group.[11] Because BSA's practice contradicts New Jersey's public policy, this stigmatization provides a strong justification for application of the LAD to BSA.

Second, the extra benefits BSA receives from government place it squarely within the category of organizations that *Roberts* and its progeny permit to be covered by the LAD. This is not to say that these connections with government transform BSA into a state actor. But they do dispose of BSA's claim that it is impermissible to apply civil rights laws to BSA at all. In *Roberts*, the Court rejected the argument that the public accommodations statute "could be used to restrict the membership decisions of wholly private groups organized for a wide variety of political, religious, cultural, or social purposes." 468 U.S. at 630. The Court was satisfied by "limiting constructions that would exclude private groups from the statute's reach" and that would avoid "an unacceptable risk of application to a substantial amount of protected conduct." *Id.* at 630-31. The same is true of the New Jersey courts' application of the criteria in the LAD to ensure that the statute only reaches organizations that can fairly be called public accommodations.

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[11] *See, e.g., Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) (in use of peremptory challenges by civil litigants to exclude jurors based on race, "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (Establishment Clause prohibits government practices that have the effect of endorsing religion because "'[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'") (citation omitted).

Justice O'Connor drew a distinction in *Roberts* between commercial organizations and other forms of expressive associations, noting that States have greater latitude under the First Amendment to prohibit discrimination by commercial entities. Her opinion described a sliding scale of First Amendment protection, with purely private expressive associations at one end and purely commercial activities on the other. As Justice O'Connor explained, "[o]nce [an organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636 (O'Connor, J., concurring in part and concurring in the judgment). Of course, the line between commercial and private expressive organizations is not always clear: "[m]any associations cannot readily be described as purely expressive or purely commercial" because "[n]o association is likely ever to be exclusively engaged in expressive activities" and "innumerable commercial associations also engage in some incidental protected speech or advocacy." *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).[12]

In many cases, asking whether an organization is at least partially "commercial" serves as a proxy for asking whether it is open to the public; the commercial vs. non-

[12] Justice O'Connor referred to BSA in a footnote when she noted that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 636. Justice O'Connor went on to say that "[t]he considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain," *id.* at 637, and she did not decide how those considerations apply to BSA. The fully-developed record here makes clear that BSA has sought and obtained special benefits from government; as a result, it is not the type of "association . . . constitutionally protected in the selection of its membership" described in Justice O'Connor's concurring opinion. *Id.* at 633.

commercial distinction parallels the quasi-public vs. private entity distinction that separates organizations a State properly may subject to a public accommodations statute from those it may not. But focusing on commercial activities alone does not capture all of the quasi-public entities whose discrimination a State has a legitimate interest in preventing. A similar distinction should be drawn under the First Amendment between "purely private" expressive organizations, on the one hand, and those that choose to obtain special benefits from (and wear the sponsorship of) the government on the other. In balancing the constitutional rights of the organization against the State's interest in preventing harm to its citizens, the court below said it "cannot ignore the BSA's historic partnership with various public entities and public service organizations" *Dale*, 706 A.2d at 282. Where a group seeks and receives extra benefits from the government that are not available to all organizations, it is reasonable for a State to act to prevent discrimination in the group's membership. This limiting principle would avoid BSA's feared application of the LAD so that "almost any organization could find itself the target," no matter how private. (Br. 37.)

III. THIS CASE IS ABOUT DISCRIMINATION AGAINST GAY SCOUTS AND SCOUTMASTERS, NOT ABOUT FREEDOM OF SPEECH.

BSA argues principally that the State's highest court put this case in the wrong doctrinal "box," and that it should be analyzed under this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), instead of under the *Roberts* framework. BSA attempts to recast its practice of excluding gay scouts and troop leaders as an attempt by Scouting "to control the conduct of *its* message." (Br. 24.) But this argument collapses under the weight of the facts. BSA's exclusion of James Dale (and all other gay scouts and scoutmasters) was based on his *status* as

a gay man, and not on the viewpoints that he may hold. There is a line between an attack on some members of a quasi-public organization because of their identity, which a State may forbid, and a disagreement between a group and its members about core views of the group, which is protected by the First Amendment. That line may be difficult to discern in some cases, but not here.

Hurley involved a refusal by organizers of Boston's St. Patrick's Day parade to allow a gay organization to march in the parade. The Court held that inclusion of the group in the parade as an expressive contingent would violate the organizers' First Amendment rights because "a speaker has the autonomy to choose the context of his own message." 515 U.S. at 573. In holding the application of the Massachusetts public accommodations statute unconstitutional as applied to the parade, the Court noted that the statute "had been applied in a peculiar way" because the organizers "disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the [organizers] had approved to march." *Id.* at 572. In *Hurley*, in other words, the parade organizers would let gays march, but not a group—whether gay or straight—that expressed a viewpoint with which the parade organizers disagreed. The organizers' decision would have been the same if, for example, a group of parents of gays had tried to march under a banner promoting tolerance and respect for their children.

In this case, by contrast, BSA excludes gay scouts and scoutmasters based solely on their sexual orientation, not based on their advocacy of a message promoting tolerance of gay youth. Indeed, while excluding gay scouts and scoutmasters, BSA does not exclude the thousands of straight scouts and scoutmasters who affirm the worth of gay scouts and teach tolerance, and who believe (as Dale

does) that BSA's discriminatory practice is wrong. The letter Dale received from BSA told him that "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." (J.A. 138.) It did not say that BSA excludes people who believe or teach that Scouts can be gay as well as "clean" and "morally straight" at the same time. Indeed, if viewpoint were truly the issue, BSA also would have expelled the regional Scout Councils that have publicly opposed BSA's policy of discrimination,[13] as well as numerous straight Scouts and Scout leaders who have done the same; [14] would have disassociated itself from the religious organizations that sponsor scout troops and appear in this Court as *amici* in support of Dale; and would have severed ties to the public schools and fire and police departments who by law must eschew discrimination. But, of course, BSA has not done so, seeking to have it both ways. The state courts made the correct finding of fact: BSA's expulsion

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[13] Two state chapters of BSA, the Narragansett Council (Rhode Island) and the Minnesota Council, have publicly urged the national officials to reconsider its practice of banning gays. *See* Jennifer Levitz, *Scouts Dragging Feet on Gay Policy Review*, Providence J., Mar. 24, 2000. Individual troops have done the same. *See, e.g.*, Affidavit of Michael Cahn, M.D. ¶¶ 17-18 (charter for Troop 260 in Santa Clara, California, renewed even though regional council and BSA were aware of resolution opposing BSA's exclusion of gay scouts and scoutmasters). (J.A. 628.)

[14] *See, e.g.*, Affidavit of William A. J. Kirkner ¶ 20 ("Because I believe that this policy is directly contrary to my moral, ethical and religious duties and obligations, I have tried to work within the Scouting movement to change the policy. . . . I have been assured that merely voicing my opposition to a policy that I believe is unfair and unjust is not grounds for revocation of my Scouting membership.") (J.A. 655); Affidavit of Robert L. Smith, Jr. ¶ 22 ("Despite my open opposition to the Scouting policy of excluding homosexuals from membership, I have been asked to continue in my role as an adult leader in Scouting. No one in Scouting has ever questioned whether I would be an appropriate role model for young Scouts in light of my opposition to the policy.") (J.A. 674.)

of Dale was "solely because of his status as a homosexual." *Dale*, 734 A.2d at 1229.

In this key respect, BSA's practice of excluding gays is different from the examples BSA and its *amici* give in conjuring up a parade of horribles: the specter of B'nai B'rith forced to accept anti-semites, (Br. 28), or PFLAG forced to accept someone who believes gays should be "cured," (Br. of Gays and Lesbians for Individual Liberty 26). In those situations, the decision to exclude would be based on the individual's active expression of a viewpoint that is fundamentally inconsistent with the group's central tenets and purposes—not on the person's *status* as a member of any group. Applying the *Roberts* analysis does not, as BSA would have the Court believe, (Br. 19-20), require that every group in society be "equally diverse." It simply ensures that an empty invocation of the First Amendment cannot serve as the pretext for a quasi-public entity to exclude members based on discrimination inconsistent with state law.

The evidence in this case fails to demonstrate that admitting gays to scout troops "will affect in any significant way the existing members' abilities to carry out their various purposes." *Rotary Club*, 481 U.S. at 548. The New Jersey Supreme Court explained in some detail the extent to which BSA's "policy" excluding gays from scouting is largely a recent litigation position unsupported by a review of BSA's public messages. As that court explained, "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." *Dale*, 734 A.2d at 1223. As a result, "[t]he organization's ability to disseminate its message is not significantly affected by Dale's inclusion." *Id.*

In fact, the hatred, shame, violence, and self-destructive behavior caused by BSA's exclusion of gays violates the traditional Boy Scout values of honesty, friendliness, kindness and fair play, and BSA's stated mission to nurture the development of all boys. BSA seeks to teach youth to become ethical and productive members of society, and prominently espouses tolerance and inclusiveness in its guiding principles. For example, Scout Law sets forth that each Scout "is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own. . . . He treats others as he wants to be treated." (J.A. 188, 221-22.) Similarly, the *Boy Scout Handbook* adds that a "morally straight" youth "[r]espect[s] and defend[s] the rights of all people." (J.A. 218; *see also id.* at 196.) The *Handbook* specifically discourages the kind of hatred that discrimination engenders:

> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

(J.A. 226.) These official statements teaching tolerance and openness—embraced by the schools and other community institutions that BSA's diverse members have aggressively recruited as troop sponsors—contradicts BSA's own discriminatory practice.

Because the record shows that BSA excludes homosexuals based on their status and not on their message, that the LAD's prohibition on anti-gay discrimination does not significantly affect BSA's own message, and, indeed, that accepting gay scouts and scoutmasters would actually be *consistent* with BSA's own stated core pur-

poses, New Jersey's strong interest in ending the harms to youth that anti-gay discrimination causes easily outweighs any burden on BSA's First Amendment interests.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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